

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JON HERNANDEZ,

Petitioner,

vs.

LANCE S. WILSON, *et al.*,

Respondents.

3:11-cv-00638-RCJ-WGC

ORDER

This purported habeas matter filed by a Nevada state inmate comes before the Court for initial review as well as upon petitioner's motion (#4) to file a \$5.00 filing fee in lieu of an *in forma pauperis* application.

The papers presented are subject to multiple substantial defects.

First, petitioner is attempting improperly to pursue what in truth is a civil rights action seeking monetary damages from the Clerk in the guise of a habeas action. Plaintiff may not circumvent the \$350.00 filing fee requirement and the corresponding filing fee payment provisions of the Prisoner Litigation Reform Act in this manner. *Cf. Andrews v. King*, 398 F.3d 1113, 1122 n.12 (9th Cir. 2005)(purported habeas action filed to avoid restrictions applicable to civil rights actions could be counted as a strike); *Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997)(purported habeas petition seeking to challenge the petitioner's placement in administrative segregation, properly construed as a civil rights complaint, could not be pursued *in forma pauperis* due to prior three strikes).

1 Second, even if the matter, *arguendo*, properly were being pursued as a habeas
2 matter, petitioner failed to use the Court's required habeas petition form as required by Local
3 Rule LSR 3-1.

4 Third, even if the matter, *arguendo*, properly were being pursued as a habeas matter,
5 the Clerk of Court is not a proper respondent in a habeas matter because he is not
6 petitioner's custodian.

7 Fourth, the claims asserted in all events are frivolous on their face. Petitioner may not
8 recover monetary damages from the Clerk of Court due to his actions or inactions as Clerk,
9 as he is absolutely immune from such suit. The legal arguments presented in the petition are
10 entirely frivolous.

11 IT THEREFORE IS ORDERED that petitioner's motion (#4) seeking to pay a \$5.00
12 filing fee shall be DENIED given that the proper filing fee for this action, properly construed
13 as seeking to avoid the requirements applicable to civil rights actions, is \$350.00.

14 IT FURTHER IS ORDERED that this action is DISMISSED without prejudice and that
15 this dismissal shall count as a "strike" for purposes of 28 U.S.C. § 1915(g).

16 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of
17 reason would not find the dismissal of this action to be either debatable or incorrect.

18 IT FURTHER IS ORDERED that the Court certifies to the Court of Appeals pursuant
19 to 28 U.S.C. 1915(a)(3) that any appeal taken – patently – is not taken in good faith.

20 IT FURTHER IS ORDERED that the Clerk shall send petitioner one copy of the papers
21 that he submitted in this action.

22 The Clerk shall enter final judgment accordingly, dismissing this action without
23 prejudice.

24 DATED: This 9th day of December, 2011.

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28 ROBERT C. JONES
Chief United States District Judge